

that a prior fitness determination was not based on criteria equivalent to the factors provided at 5 CFR 731.202, and that a new investigation or adjudication is necessary is not subject to review under section 731.501 of this part.

§ 731.105 Authority to take suitability actions.

(a) Neither OPM nor an agency acting under delegated authority may take a suitability action in connection with any application for, or appointment to, a position that is not subject to investigation or check under § 731.104.

(b) OPM may take a suitability action under this part against an *applicant* or *appointee* based on any of the criteria of § 731.202;

(c) Except as limited by § 731.103(g), an agency, exercising delegated authority, may take a suitability action under this part against an *applicant* or *appointee* based on the criteria of § 731.202;

(d) OPM may take a suitability action under this part against an *employee* based on the criteria of § 731.202(b)(3), (4), or (8).

(e) An agency may not take a suitability action against an *employee*. Nothing in this part precludes an agency from taking an adverse action against an employee under the procedures and standards of part 752 of this chapter or terminating a probationary employee under the procedures of part 315 or part 359 of this chapter. An agency must notify OPM to the extent required in § 731.103(g) if it wants to take, or has taken, action under these authorities.

§ 731.106 Designation of public trust positions and investigative requirements.

(a) *Risk designation.* Agency heads must designate every covered position within the agency at a high, moderate, or low risk level as determined by the position's potential for adverse impact to the efficiency or integrity of the service. OPM will provide an example of a risk designation system for agency use in an OPM issuance as described in § 731.102(c).

(b) *Public Trust positions.* Positions at the high or moderate risk levels would normally be designated as "Public

Trust" positions. Such positions may involve policy making, major program responsibility, public safety and health, law enforcement duties, fiduciary responsibilities or other duties demanding a significant degree of public trust, and positions involving access to or operation or control of financial records, with a significant risk for causing damage or realizing personal gain.

(c) *Investigative requirements.*

(1) Persons receiving an appointment made subject to investigation under this part must undergo a background investigation. OPM is authorized to establish minimum investigative requirements correlating to risk levels. Investigations should be initiated before appointment but no later than 14 calendar days after placement in the position.

(2) All positions subject to investigation under this part must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, or Non-critical-Sensitive, when appropriate. This designation is complementary to the risk designation, and may have an effect on the position's investigative requirement. Sections 732.201 and 732.202 of this chapter detail the various sensitivity levels and investigation types. Detailed procedures for determining investigative requirements for all positions based upon risk and sensitivity will be established in an OPM issuance as described in § 731.102(c).

(3) If suitability issues develop prior to the required investigation, OPM or the agency may conduct an investigation sufficient to resolve the issues and support a suitability determination or action, if warranted. If the person is appointed, the minimum level of investigation must be conducted as required by paragraph (c)(1) of this section.

(d) *Suitability reinvestigations.* Agencies, relying on authorities such as the Computer Security Act of 1987 and OMB Circular No. A-130 Revised (issued November 20, 2000), may require incumbents of certain public trust positions to undergo periodic reinvestigations. The appropriate level of any reinvestigation will be determined by the agency, but may be based on supplemental guidance provided by OPM.

§ 731.201

5 CFR Ch. I (1–1–09 Edition)

Subpart B—Suitability Determinations and Actions

§ 731.201 Standard.

The standard for a suitability action defined in § 731.203 and taken against an applicant, appointee, or employee is that the action will protect the integrity or promote the efficiency of the service.

§ 731.202 Criteria for making suitability determinations.

(a) *General.* OPM, or an agency to which OPM has delegated authority, must base its suitability determination on the presence or absence of one or more of the specific factors (charges) in paragraph (b) of this section.

(b) *Specific factors.* In determining whether a person is suitable for Federal employment, only the following factors will be considered a basis for finding a person unsuitable and taking a suitability action:

- (1) Misconduct or negligence in employment;
- (2) Criminal or dishonest conduct;
- (3) Material, intentional false statement, or deception or fraud in examination or appointment;
- (4) Refusal to furnish testimony as required by § 5.4 of this chapter;
- (5) Alcohol abuse, without evidence of substantial rehabilitation, of a nature and duration that suggests that the applicant or appointee would be prevented from performing the duties of the position in question, or would constitute a direct threat to the property or safety of the applicant or appointee or others;
- (6) Illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation;
- (7) Knowing and willful engagement in acts or activities designed to overthrow the U.S. Government by force; and
- (8) Any statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question.

(c) *Additional considerations.* OPM and agencies must consider any of the following additional considerations to the extent OPM or the relevant agency, in its sole discretion, deems any of them pertinent to the individual case:

(e) *Risk level changes.* If a person moves to a higher risk level position, or if the risk level of his or her position itself is changed, the person may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the move or the new designation is final.

(f) *Completed investigations.* Any suitability investigation completed by an agency under provisions of paragraph (d) of this section must result in a determination by the employing agency. The subject's employment status (i.e., applicant, appointee, or employee as defined in § 731.101) will determine the applicable agency authority and procedures to be followed in any action taken.

EFFECTIVE DATE NOTE: At 73 FR 66492, Nov. 10, 2008, § 731.106 was amended by revising paragraphs (c)(2) and (e), effective Jan. 9, 2009. For the convenience of the user, the revised text is set forth as follows:

§ 731.106 Designation of public trust positions and investigative requirements.

* * * * *

(c) * * *

(2) All positions subject to investigation under this part must also receive a sensitivity designation of Special-Sensitive, Critical-Sensitive, or Noncritical-Sensitive, when appropriate. This designation is complementary to the risk designation, and may have an effect on the position's investigative requirement. Sections 732.201 and 732.202 of this chapter detail the various sensitivity levels and investigative requirements. Procedures for determining investigative requirements for all positions based upon risk and sensitivity will be published in OPM issuances, as described in §§ 731.102(c) and 732.201(b).

* * * * *

(e) *Risk level changes.* If an employee experiences a change to a higher position risk level due to promotion, demotion, or reassignment, or the risk level of the employee's position is changed to a higher level, the employee may remain in or encumber the position. Any upgrade in the investigation required for the new risk level should be initiated within 14 calendar days after the promotion, demotion, reassignment or new designation of risk level is final.

* * * * *